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5 **UNITED STATES DISTRICT COURT**  
6 **NORTHERN DISTRICT OF CALIFORNIA**

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8 **IN RE PLUM BABY FOOD LITIGATION,**

9 Case No. 4:21-CV-913-YGR

10 **ORDER GRANTING IN PART AND DENYING IN**  
11 **PART MOTION TO DISMISS AND/OR STAY**

12 Re: Dkt. No. 103

13 Plaintiffs bring this action against defendants Plum, PBC and Plum, Inc. (collectively,  
14 “Plum”) under various state statutes and common law, alleging that Plum failed to disclose that its  
15 baby food products contain (or have a risk of containing) heavy metals (namely, arsenic, cadmium,  
16 lead, and mercury), and perchlorate. (Dkt. No. 98.)<sup>1</sup> Currently pending is Plum’s motion to dismiss  
17 the first amended consolidated class action complaint or, in the alternative, to stay. (Dkt. No. 103.)

18 Having carefully considered the pleadings, the briefing on the motions, and for the reasons  
19 stated on the record at the January 11, 2022 hearing, the Court **GRANTS IN PART AND DENIES IN**  
20 **PART** the motion.

21 First, the motion to dismiss for plaintiffs’ lack of Article III standing to pursue their claims is  
22 **DENIED**. The Court finds that plaintiffs have adequately alleged an injury in fact by alleging that  
23 they “would have not paid [the purchase price or the price premium] had they known that the Baby  
24 Foods included levels of Heavy Metals, perchlorate, and/or undesirable toxins or contaminants.”  
25 (Compl. ¶ 57.) The Ninth Circuit’s decision in *McGee v. S-L Snacks Nat’l*, 982 F.3d 700 (9th Cir  
26 2020) does not preclude such a finding. Further, Plum’s reliance on *Herrington v. Johnson &*  
27 *Johnson Consumer Companies, Inc.*, No. 09-CV-1597 (CW), 2010 WL 3448531, at \*8 (N.D. Cal.

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<sup>1</sup> Defendant Plum, PBC notes that Plum, Inc. was converted into a public benefit corporation  
and was renamed Plum, PBC and thus Plum, Inc. no longer exists. (Dkt. No. 103 at 2 n.1.)

1 Sept. 1, 2010) does not persuade. The motion to dismiss based on the argument that plaintiffs' lack  
2 of Article III standing to seek injunctive relief is also **DENIED** (except as to plaintiff Jessica David),  
3 as all of the plaintiffs except for David allege that they would "be willing to purchase Plum Organic  
4 products in the future if [plaintiffs] could be certain that they do not contain (o[r] have a material risk  
5 of containing) Heavy Metals or perchlorate." (Compl. ¶¶ 30, 33, 36, 39, 42, 45, 51, 53, 56.) *See*  
6 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018).

7 Second, the motion to dismiss on the basis of conflict preemption is **DENIED**. Plum fails to  
8 articulate any specific federal law or regulation with which plaintiffs' state law claims purportedly  
9 conflict. Third, the motion to dismiss on primary jurisdiction grounds is **DENIED**. The Court need  
10 not rely on the FDA's expertise or its potential guidance on action levels to determine whether  
11 Plum's alleged omissions are actionable given the allegations of the operative complaint. *See Clark*  
12 *v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) ("[T]he doctrine is not designed to  
13 secure expert advice from agencies every time a court is presented with an issue conceivably within  
14 the agency's ambit.") (internal quotation marks omitted). Moreover, uncertainty over how and when  
15 the FDA will act counsels against an indefinite stay. *See Astiana v. Hain Celestial Grp., Inc.*, 783  
16 F.3d 753, 760 (9th Cir. 2015) ("'[E]fficiency' is the 'deciding factor' in whether to invoke primary  
17 jurisdiction.") (quoting *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007)).

18 Fourth, the motion to dismiss for lack of a plausible deception theory is **DENIED**. Plum  
19 would have the Court determine that "consumers know and understand that trace amounts of heavy  
20 metals are ubiquitous" and that "the mere presence of heavy material is not material to reasonable  
21 consumers." (Mtn. at 23.) These are factual issues not appropriate for resolution at this stage in the  
22 proceedings and are plausibly alleged.

23 Finally, the motion to dismiss for failure to plausibly allege a breach of implied warranty of  
24 merchantability claim is **GRANTED WITHOUT PREJUDICE**. Plaintiffs have not adequately alleged  
25 that the product was not fit for consumption, that is, the ordinary purpose for which the goods at  
26 issue are used.

27 At this juncture, plaintiffs indicate that they are not in a position to amend the complaint any  
28 further. Accordingly, Plum shall file its answer to the operative complaint no later than **January 31**,

1       **2022.** The Court hereby **SETS** a case management conference for **March 14, 2022**. Five (5)  
2 business days prior to the conference, the parties shall file a joint case management statement.

3       This Order terminates Docket Number 103.

4       **IT IS SO ORDERED.**

5       Dated: **January 12, 2022**

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7       YVONNE GONZALEZ ROGERS  
8       UNITED STATES DISTRICT COURT JUDGE